91-1967

No. _____

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NICHOLAS DAMER,

Petitioner,

v.

SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

GERALD C. STERNS; LAW OFFICES OF GERALD C. STERNS, A California Professional Corporation; JOHN C. ELSTEAD; ELIZABETH W. WALKER; WEIL ADJUSTERS AND CONSULTANTS, INC., A California Corporation; LAWYERS MUTUAL INSURANCE COMPANY, A Corporation; GERSON MEHLMAN; and ROBERT DENEBEIM,

Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Nicholas Damer, Counsellor At Law
LIBERTY COURT, 30 Avenue Portola
P. O. Box 939, El Granada, CA 94018
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QUESTION PRESENTED:

DOES NATIONAL UNION V. ARNOLD -- (1954) 348 U.S. 37 -- ESTABLISH THAT THE FIFTH AND THE FOURTEENTH AMENDMENTS' CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION OF LAW:

(1) PREVENT ANY STATE FROM DISMISSING A PROPER APPEAL WHEN THE APPELLANT DECLINES TO SUFFER IRREPARABLE INJURY BY SATISFYING THE JUDGMENT UNDER APPEAL WHILE THE APPEAL IS PENDING; AND

(2) REQUIRE ALL STATES TO PERMIT AN APPELLANT TO PRESERVE A RIGHT OF APPEAL -- BY EITHER POSTING BOND OR OTHERWISE FULLY FACILITATING THE ENFORCEABILITY OF THE CHALLENGED JUDGMENT SHOULD IT BE AFFIRMED -- WITHOUT FIRST AND FOREVER FORFEITING THE VERY PERSONAL PROPERTY AND RIGHTS THE APPEAL WAS INTENDED TO PRESERVE?

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Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Damer respectfully urges this Honorable Court to grant this Petition for Writ of Certiorari, seeking review of the actions of the California Supreme Court, which effectively allowed the dismissal of Petitioner's appeals upon motion by the Real Parties In Interest Gerald Sterns, et al.

PROCEEDINGS BELOW

The instant controversy arises from the same circumstances presented to this Court in proceedings pending before it in 1991, as No.90-1963 (Petition denied October 7, 1991.)

The previous petition challenged the refusal of the California Supreme Court to entertain a petition for writ of certiorari seeking review of an August 29, 1990 judgment of contempt against Petitioner.

The contempt judgment was imposed on account of Petitioner's failure to comply with written and oral trial court orders:
1) to surrender Petitioner's files so they could be "shredded" at Real Parties' request; (2) to permit access by the Real Parties to those files so Petitioner's informants and investigations could be fully ascertained; and (3) to refrain, indefinitely, from "discussing" the case or the settlement "with the press or any other person" including Court staff. (Provisions of the trial court order, in its written form, are in Appendix A; that order was signed and filed on April 4, 1990.)

On Friday, March 9, 1990, at 5:30 p.m., as a prelude to the later April 4, 1990 order, Respondent Court issued oral orders which required Petitioner to surrender custody of his files and all copies thereof by 9:00 a.m. on Monday March 12, 1990 (see Appendix B.)

The oral orders were designed, at the Real Parties' request, to deny meaningful appellate intervention (including any stay) -- a design then readily achievable, since when the oral orders were issued after 5:07 p.m., the state and federal appellate courts were already closed for the weekend and would not be open and functioning until after Petitioner was supposed to have forfeited all papers as of 9:00 a.m. the following Monday.

While simultaneously challenging the orders (and inevitable contempt judgment) through petitions for discretionary writs, Petitioner, as an Appellant, also challenged all the orders through timely filed appeals which were authorized, and governed by, the California constitutional scheme (Article VI, §14, requiring the courts of appeal to decide every appellate case on the merits and by way of a fully public and written opinion.)

In every form and forum, Real Parties opposed the petitions for discretionary writs. One tack taken was to suggest, subtly and otherwise, that Petitioner would have an effective remedy by way of his normal appeals, and that review by writ was thus unwarranted (see, for example, the BRIEF IN OPPOSITION filed by Real Party Sterns, et al. in this Court, at the bottom of page 2.)

Yet shortly after filing the BRIEF IN OPPOSITION with this Supreme Court, Real Parties filed a Motion To Dismiss Appeals in the California Court of Appeal. Real Parties Sterns and Elstead argued that Petitioner's appeals were all "frivolous"; that the orders under review were all non-appealable; that Petitioner lacked standing to appeal in any event; and that Petitioner should be further fined and denied any appeal as punishment for the "contempt" of retaining his files etc.

The Court of Appeal then ruled (see Appendix C) -- rejecting the arguments re "frivolous" appeals and monetary sanctions, and affirming the Appellant's standing to appeal and the appealability of the "gag" and file forfeiture orders. But the Court of Appeal also stated dismissal would follow unless Appellant, Petitioner, surrendered all of his papers in compliance with Paragraph 7 of the April 4, 1990 Order (please see Appendix A for the text of Paragraph 7.)

Appellant, Petitioner, then requested clarification, since the Court of Appeal's ruling seemed to be an oxymoron. How, for example, could the Appellant prosecute an appeal in any event if he could not have the files which constituted the record on appeal or the files which reflected his research? And how could the Appellant prosecute an appeal without "discussing the case"?

As in his opposition to the dismissals, so again, in his Motion For Reconsideration, Petitioner specifically raised the clear constitutional issues. (See Appendix D, citing National Union v. Arnold, supra.)

Petitioner also timely filed requests for supersedeas; filed requests to post a bond; and pursued every other avenue of relief to preserve his right to prosecute his appeal. Petitioner proposed various orders which would have allowed him to use a copy of his file for purposes of pursuing the appeals, and which would have barred Real Parties from having access to his file until the appeals were fully concluded on the merits.

Petitioner also sought to stay the "gag" order so that merely prosecuting the appeal would not -- like his initial March 30, 1990 petition for a stay -- be held to be contempt.

Petitioner duly pointed out how absent such protections, the appeals would ultimately be dismissed as moot in any event; for if his files were surrendered, and the Real Parties reviewed them or had them all "shredded" before the appeals were decided, the object of the appeals could never be accomplished.

All three levels of the state judiciary declined to appreciate or to follow the logic of National Union v. Arnold, supra, or the pleas for due process and equal protection.

All of Petitioner's efforts, in the trial and the appellate courts, were for naught. The Court of Appeal dismissed the appeals on November 19, 1991 (see Appendix E.) Petitioner then requested relief from the Supreme Court of California (Appendix F.) That Supreme Court then denied review on February 11, 1992 (see Appendix G.)

JURISDICTION

28 United States Code §1257(a) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution."

Petitioner preserved, below, his challenges based on the United States Constitution -- including the Fifth and the Fourteenth Amendments -- as shown in the Appendices. This Petition is presented within ninety days of February 11, 1992 order denying review by the California Supreme Court (Appendix G.)

CONSTITUTIONAL PROVISIONS INVOLVED (emphasized below)

The Fifth Amendment provides:

> "No person shall be ... deprived of life, liberty, or property, without due process of law ..."

And, the first section of the Fourteenth Amendment provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner requests this Honorable Court to consider the above portion of this Petition, entitled "PROCEEDINGS BELOW", as the equivalent of a "concise statement of the case" as required by Rule 14 (g), and to deem that prior portion incorporated by reference here, to avoid redundancy and to achieve brevity. The facts recited above demonstrate that the California judiciary has, at the request of the Real Parties, consistently acted, since March of 1990, to defeat the right of Petitioner to obtain any meaningful, timely review by any California appellate court. The result was to avoid ever having to generate a written and public opinion regarding the legal merits of measures taken to "gag" Petitioner, to seize and disclose his confidential work product, and to have definitive proof of Real Parties' thefts from clients (Appendix H) "shredded".

Petitioner's numerous efforts to obtain the granting of discretionary writs never accomplished even an approximation of the full appellate process guaranteed by the California mandatory constitutional method. Not a single writ request ever produced any exposition or analysis of the merits of Petitioner's challenges to the "secret settlement" reached without his consent. Finally, upon the initiative of Real Parties, Petitioner's appeals were dismissed because he refused to make them moot by delivering, to a "receiver" chosen by Real Parties, the very property whose privacy and preservation the appeals were trying to perpetuate.

The California courts' actions equate with the type of conduct implied in National Union v. Arnold, supra, as effecting denial of the due process and equal protection guaranteed by the United States Constitution.

ARGUMENT

I. THE RATIONALE OF THE NATIONAL UNION V. ARNOLD CASE SHOULD BE EXTENDED TO INDICATE THAT AN APPELLANT CANNOT BE REQUIRED, AS A CONDITION OF PROSECUTING AN APPEAL, TO IRREVOCABLY SURRENDER THE VERY RIGHTS AND INTERESTS THE APPEAL IS SEEKING TO VINDICATE, ESPECIALLY WHERE NO SIGNIFICANT PREJUDICE WOULD BE SUFFERED BY THE RESPONDENTS FROM POSTPONING THE ENFORCEMENT OF THE TRIAL COURT JUDGMENT UNTIL FINAL CONCLUSION OF THE FULL APPELLATE PROCESS

For convenient reference, Appendix I, to this instant Petition for Certiorari, is a copy of the opinion of this Court issued in National Union v. Arnold (1954) 348 U.S. 37.

The majority opinion in National Union held that the actions of appellate courts, in the State of Washington, did not amount to a denial of the due process or equal protection the Constitution assures.

In National Union Petitioner/Appellant Arnold had lost a plenary trial in the court of original jurisdiction, suffering an adverse monetary judgment of $475,000.00 in favor of ninety-five individual plaintiffs.

Unlike Petitioner Damer here, Arnold -- who had a plenary trial on the merits of his claim -- never requested any stay of the adverse judgment and never offered to post any undertaking. The assets Arnold had, and which could have been made available to satisfy the judgment were the appeal lost, were kept totally out of the control of the Washington courts, and were kept under the exclusive control of Arnold without any ultimate recourse by the judgment creditors.

The Washington courts ordered Arnold to deposit those assets with a receiver, to be held -- and kept unavailable to Arnold or his adversaries -- pending the appeal's outcome. This Court also noted that the involved assets were the only means whereby Arnold could ever satisfy any final judgment. This Court, at 348 U.S. 44, then went on to add:

> "In appraising the reasonableness of the State's order, it is noteworthy that the [State] court did not seek to apply the bonds to the satisfaction of respondents' judgment. It [the State court] merely directed Petitioner to deliver them [the bonds] to the Court's receiver for safekeeping. Petitioner's appeal was not dismissed because of petitioner's failure to satisfy a judgment pending an appeal from it. It was dismissed because of petitioner's failure to comply with the [State] court's order to safeguard petitioner's assets from dissipation pending such appeal."

The National Union scenario further contrasts strongly with that involved in this instant case. As Appendices A and B hereto show, money judgments were not sought from Petitioner herein, and preserving such awards was never Respondents' purpose. Instead, Respondents' objective was to destroy an asset in which the Petitioner had indisputable proprietary rights -- namely, his confidential work product as an attorney. Respondents also sought to instantaneously and permanently prevent Petitioner from ever having access to that work product, including any copies of Petitioner's papers, so that Petitioner "neither directly nor indirectly" use any of that information. Assurance of such a prohibition would be accomplished by a motion to have the papers "shredded"; a request which did not even require any notice to Petitioner and which could have also avoided appellate scrutiny.

Before accomplishing that destruction, Respondents wanted to possess and peruse Petitioner Damer's files, in order to learn what Damer had learned about Respondents' illegal activities, and in order to learn how, and from whom, Damer obtained such facts. As shown in Appendixes A, B, and the sixth page of Appendix D, the trial court's order allowed Respondents to "gain access" to Damer's papers while those papers would be in the custody of Respondents' "receiver." As further shown in Appendix D, Petitioner Damer proposed a supersedeas order which would safeguard his files while the appeals were pending and prevent his papers from being read or "shredded" by any of the Respondents. Just as the trial court denied Damer the opportunity to post any bond, so the Court of Appeal demanded that Damer be totally dispossessed of his files -- and all copies thereof -- in order to appeal at all.

Had Petitioner Damer complied with such conditions, his appeals would have been rendered moot (and thus subject to dismissal in any event) since he would have forever forfeited one of the rights he sought to establish -- namely, the right of an attorney at law to maintain the continuous and uninterrupted possession of at least a copy of his files -- a right implied by the California Rules of Professional Conduct that the state Supreme Court wrote. And had Damer's files been also read or "shredded" pending the appeals, the appeals would have been even more utterly and absurdly futile.

For unlike the situation in National Union, where Arnold's bonds would have been returned to him had he prevailed on appeal, the same would not be true had Petitioner herein been finally and completely triumphant after an appeal on the merits.

In the interim, Damer not only would have been deprived of any beneficial use of his property (for example, in National Union, interest earned on Arnold's bonds) but, more significantly, Petitioner Damer might not have gotten his property back at all, much less intact, and he would not have had that property's unique characteristics -- including privacy --"safeguarded" during the appeals.

In essence, the Court of Appeal's ruling, which the California Supreme Court declined to overturn, amounted to requiring Petitioner "to satisfy a judgment pending an appeal from it" – a condition this Court in National Union all but held would be an unconstitutional denial of due process.

Also noteworthy was the Court of Appeal's refusal to stay the "gag" order, imposed on Damer, pending the appeals.

That omission basically put Petitioner at risk of further contempt proceedings, just for the very act of pursuing the appeals themselves!

Likewise significant is that Damer's appeal from a monetary sanction order of August 29, 1990 (Appeal No. AO51426) -- which had been consolidated with the appeal from the March and April 1990 dispossession and "gag" orders (AO49857) -- was also dismissed after Damer declined to purport to surrender all of his files and "all copies".[1] This dismissal should be, in the words of National Union, "regarded [by this Court] as a penalty imposed for criminal contempt" in a manner that impermissibly interfered with Petitioner's appeal rights provided by law.

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[1] Of course, Damer could have simply preserved his appeal by delivering boxes of documents to the "receiver" while secretly keeping a copy of the file and while retaining all the confidential materials. However, to defy a court is better than to lie to one.

Such a "penalty" was precisely what Respondents sought to impose by way of their motion to dismiss both of the appeals. Although the Court of Appeal declined to award monetary "sanctions" per se (which would have necessitated a determination that the appeals were frivolous) the Court of Appeal basically forced Petitioner to choose between; on the one hand, surrendering his rights as an attorney at law to safeguard his work product, and, on the other hand, forfeiting a right to appeal from an August, 1990 award of monetary sanctions (an award separate and apart from the $3,000.00 contempt penalty, and from which award California law guarantees an appeal.)

Respondents cannot claim (as could Respondents in National Union) inordinate prejudice from Damer's possession of his work product while the appeals proceeded.

Indeed, no such argument was made as part of the Respondents' motions to dismiss. Failure to make that argument was, in effect, an admission that such contention would be inappropriate in this situation. Unlike the National Union setting, the danger of any "dissipation", of the "res" of the appeal, arose not from Damer's unfettered access to his work product, but from the Respondents' desire to have that work product "shredded" at the earliest opportunity (for example, by way of an "ex parte" order issued after all the courts of appeal closed on a Friday.)

Accordingly, the spirit of the National Union holding should be extended into the letter of this Court's ruling in this matter, to hold that the actions of the California courts, commencing in March, 1990 and culminating in February of 1992, are incompatible with rights to due process and equal protection.

II. THIS COURT SHOULD FULLY ACKNOWLEDGE THE EVOLUTION OF MODERN DAY DUE PROCESS AND HOLD THAT A RIGHT OF PLENARY APPEAL MUST BE PROVIDED BY EVERY STATE

Although this Supreme Court could decide in Petitioner's favor by merely extending the rationale of the majority opinion in National Union, perhaps it would be better and wiser to adopt the viewpoint set forth in the dissent in that case.

As noted by the California courts (see the fifth page of Appendix F) "the right of appeal is basic." Such a sentiment should still be keen in a nation born with a wary view of the frailty of those wielding power and which grew to establish, in its basic laws, a system of checks and balances and other barriers to improvident state action.

Were members of the judiciary -- and staffs who serve the judges -- immune from the human tendency to make mistakes, then motions for reconsideration, appeals, and petitions for rehearing would be unneeded. This Supreme Court could not perform a more noble and worthwhile deed than to definitively declare the right of appeal to be an inalienable element of citizenship in a nation dedicated to the propositions "all men are created equal" and "equal justice under law" -- ideas that necessarily include the view that all persons are vulnerable to error. Indeed, the tolerance that is required, to make our society endure, is founded upon a common sense inconsistent with the concept that judges are the last remnants of royalty, can do no wrong, and truly need no review.

This Supreme Court has, in recent years, come close to such a humble vision.

Although this Court has never ruled that there is a constitutionally guaranteed right to appeal, this Court has never held that there is no Constitutional right to appeal, either, noting only in dicta from time to time that "There is, of course, no constitutional right to appeal"; Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983). Unlike the situation herein, in Jones as in all cases where such dicta appear, the State had afforded plenary appeals to the involved defendants; so the issue of the right to an appeal, after denial thereof, can be directly addressed, here and now, in terms of modern-day due process.

This surely is the time and the case to expand the sensibility of United States v. Mendoza-Lopez, 481 U.S. 828, 837-838 (1987) and to recognize that all governmental power is exercised by mere human beings:

> "Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative process" (emphasis supplied.)

Whether those deciding the fates of others, under color of public authority, are wearing business suits or judicial robes, the same potential for error is present, as is the need for a mechanism to oversee that process and correct any improvident or unjust acts. The time has come to moot the many ways this Court has used, over the years, to circumvent the unrealistic and undemocratic dicta that "due process" does not include a meaningful appeal (see, e.g., the rule that if provided by state law, appeals must proceed "without discrimination"[2] -- a superfluous rule since all states allow appeals.)

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[2] National Union, supra, 348 U.S. at 43.

CONCLUSION

Petitioner has been denied not only basic due process by his state's judicial system; he has also been denied the equal protection of California's laws, which assure mere civil litigants, quarrelling over a few thousand dollars, the right to a plenary appeal which cannot be dismissed. Such a paradox should be held unconstitutional.

For the foregoing reasons, Petitioner urges that the writ of certiorari be granted.

Respectfully submitted,

Nick Damer

Nicholas Damer May 9, 1992

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In Propria Persona

APPENDIX A

Filed April 4, 1990
Donald W. Dickinson, Clerk
Deputy

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER SEVEN

No. 826-241
ORDER RE:
SETTLEMENT AGREEMENT

MARIA SEWARD, aka
MARIA SEWARD SARGENT,
Plaintiff,

v.

GERALD C. STERNS, et al., Defendants.

...IT IS HEREBY ORDERED:

... 3. All parties to this action, including lawyers of the parties and former lawyers of the parties, are prohibited from discussing this case, or this settlement, with the press or with any other person....

... 7. This court ordered on March 9, 1990, that Nicholas Damer hand over the file of Seward v. Peters, and the file which was prepared in this action, and all copies of all documents which constitute those files, to [retired, private party]

Justice Scott at 9:00 a.m. on March 12, 1990, at the Law Offices of Damer & Stryker, 30 Avenue Portola, El Granada, California 94018.

... 9. ...access to the files described above can...be had through an order of Judge Alfred G. Chiantelli....

... 12. After it is determined that maintenance of those files is no longer necessary, the entire file is to be shredded....

DATED: April 4, 1990

Alfred Chiantelli

ALFRED CHIANTELLI
Judge of the Superior Court

[Please Note: The entirety of this Order Re: Settlement Agreement has been filed twice, by Real Parties, as a public document, in another California Superior Court, an a suit against Petitioner]

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT 07

NO. 826-241

REPORTER'S TRANSCRIPT
Proceedings of March 7, 1990

...THE COURT: recite the settlement...

...MR. DENEBEIM:...Maria Seward would transfer and assign to a designated agent which would -- could include attorneys of the defendants of her complete files, all copies of her files to the designated agent and further agree that after this agreement is made, no copies are going to be made of any of these files...the files thereafter would then be owned by the defendants....

MR. GEBHARDT:...And Damer is neither directly nor indirectly to use any information gained in this case in any other case that he might bring or be involved in. ...that he not use directly or indirectly any information gained in this case in any other litigation.

THE COURT: All right, is that the extent of what has been indicated?

MR. DENEBEIM: That is my understanding....

REPORTER'S TRANSCRIPT
Proceedings of [Friday] March 9, 1990

...MR. DAMER: Mr. Cooper my expert also objects to any order relating to records and so on and so forth because he is powerless to prevent you from placing into the hands of third parties material which reflects confidential communications from him to me which was with--which were never even intended for my client to see as a part of my work product...And there are other persons who made similar confidential communications....

...MR. GEBHARDT: You want me to speak? I have some proposals.

THE COURT: Yes.

MR. GEBHARDT: I have talked to [retired] Judge Scott, he is willing to be a receiver custodian of the entire file.

He--I have arranged to pick up the entire file on Monday morning at 9:00 o'clock. Judge Scott can be there at Mr. Damer's office....

...the file and all copies of the file are to be placed in boxes, taken to a secure area which I have arranged for....

...MR. SIMON: [an attorney aligned with Real Parties] Your Honor, may the record reflect it is 5:07 [p.m., Friday afternoon]....

...MS. FRAZIER: [Petitioner Damer's counsel] One other thing.

We would request a stay of this order for a period of thirty days so that a writ might be taken. With the way that this order is and the time that it is today [after 5:07 p.m.], it would be impossible for us to file a writ prior to the documents being picked up at 9:00 AM this coming Monday and so we ..request a stay.

THE COURT: That will be denied....

...MR. DAMER: Your Honor, am I to be -- am I to understand that I would be held in contempt if I don't turn these files over by 9:00 AM tomorrow -- 9:00 AM Monday?

I mean there is not even going to be a written order served on me by 9:00 AM Monday that is approved as to form by me for example. I mean really, Judge, due process requires some period of stay.

I have told you I am not going to destroy these records....

...Can there be a stay so that I do not have to be in conflict with this court, so that I can have some time to have a court of appeal decide...whether or not to issue a writ of prohibition or a writ of pro warranto [sic] and so forth, can I have some meaningful appellate remedy rather than having this court force me into conflict with you on this matter, over the weekend?

I mean it is just -- I have given you, I have told you I am not going to destroy any of this material, okay; the material will be maintained in its integrity pending the normal appellate review process, so there is no prejudice to any party by my, you know, having an adequate period of time to appeal this order. I mean normally from any normal order, Your Honor, there is a sixty day writ period....

...I am begging you to give me due process of law....

THE COURT:....

...I have indicated and I am going to abide by this order that you have these records ready at 9:00 o'clock in the morning.....

APPENDIX C

CALIFORNIA COURT OF APPEALS
FIRST APPELLATE DISTRICT
DIVISION FOUR

MARIA SEWARD
v.
GERALD C. STERNS, et al.
NICHOLAS DAMER

FILED
OCT 22 1991
Court of Appeal - First App.Dist.
By RON D. BARROW
DEPUTY

AO49857
AO51426

San Francisco County
Sup. Ct. No. 826241

BY THE COURT:

The motions of respondents John C. Elstead et al., Jeanette Shipman, and Maria Seward **to dismiss the appeals are granted in part, and granted conditionally in part, as follows:**

The appeal by Nicholas Damer ("Damer"), Lance S. Stryker, and Damer & Stryker (collectively, "appellants") of the orders filed March 16, 1990 and June 19, 1990 are dismissed for lack of standing. Appellant's appeal of the order filed April 4, 1990, is dismissed on the same ground except insofar as it involves the provisions of that order prohibiting appellants from discussing the case or its settlement, and the order's provisions relating to appellants' files. (Code of Civil Procedure, section 902.) The dismissal ordered in the preceding sentence covers the appeal of all other aspects of the April 4, 1990, order, including, without limitation, the order's provisions for the sealing of documents and its alleged failure to accurately reflect the terms of the settlement.

Appellants' appeal of the April 4, 1990, order insofar as it involves their files and their discussion of the case or its settlement, and Damer's appeal of the August 29, 1990, order for sanctions, **will be dismissed unless, within fourteen (14) calendar days of the date hereof, this Court has received satisfactory evidence that [Appellant/ Petitioner] Damer has delivered all of the documents referred to in paragraph 7 of the April 7, 1990, order to retired Justice Scott acting in the capacity of receiver.** (Luce v. Clear Lake Water Co. (1968) 266 Cal.App.2d 123, 125; Tobin v. Casaus (1954) 128 Cal.App.2d 588, 593.

The motions of Shipman and Seward **for sanctions [for pursuing frivolous appeals] are denied.**

The request of Damer for oral argument on these motions to dismiss is denied.

Dated: October 22, 1991. ANDERSON P.J.

APPENDIX D

APPELLANTS' MOTION FOR CLARIFICATION OR RECONSIDERATION OF ORDER OF OCTOBER 22, 1991 CONDITIONALLY DISMISSING APPEALS

Appellants Damer ... hereby request clarification or reconsideration of this Court's [of Appeal] October 22, 1991 order, so as to add thereto the following..:

"(1) The documents to be delivered to Retired Justice Scott shall be delivered and maintained in sealed boxes, and said boxes shall not be opened pending further order of this Court and final disposition of these appeals. The documents shall also be stored in facilities where no access is possible to any person but Justice Scott, who shall keep the location a secret.

The identity of that location shall be provided only to this Court, in a sealed envelope sent by certified mail, and shall be kept under seal. The documents shall also be stored in facilities possessing adequate intruder detection, fire suppression and theft protection safeguards.

(2) Pending the finality of the April 4, 1990 order, the effect thereof shall be further stayed in that Appellants shall be entitled to maintain copies of the files for lawful purposes including: prosecuting these appeals; defending their interests in the malpractice action claims brought against them by Maria Seward and her counsel (see 1 CIVIL A053911); and pressing Appellant's complaints (and defending against any complaint of any Respondent) to the State Bar of California concerning the allegations or misconduct of Respondents and their counsel or any similar allegations against Appellants.

(3) Appellants shall not be required to deliver, to Justice Scott, any papers already publicly on file with any Superior Court or this or the Supreme Court (e.g., pleadings, motion papers, briefs, et cetera) and not presently under seal.

(4) The time for effecting said delivery shall be extended until 28 days after the date hereof.

...

The basis for this motion -- and for the alternative request for a stay and writ of supersedeas -- is as follows.

... Without any further clarification or modification, this Court's October 22, 1991 order could take away with one hand, from Appellants, what was given by the ... other hand -- namely, the right to prosecute a meaningful appeal from those orders most drastically affecting Appellants and depriving them of their property interests and personal liberties.

...Any appeal from the order of dispossession would be rendered moot if, before any such appeal were finally concluded, the Respondents were allowed to gain access to Appellants' files, directly or indirectly, or were allowed to arrange for the final "shredding" of these files. Any appeal from the April 4, 1990 "order prohibiting appellants from discussing the case or its settlement" ...would be a dangerous exercise if the Appellants, by prosecuting the appeals, could by those very actions be later found in contempt for violating the April 4 order. (Webster's Dictionary defines "discuss" as "to talk or write about.")

Any appeal -- whose maintenance were conditioned upon the Appellants' never being in possession of the very documents

required to effectively prosecute the appeal -- would be an illusory remedy, since Appellants could not even have a copy of the record on appeal to comply with the requirement of citing to page and line numbers when discussing, in briefs, the events that occurred below.

Any appeal -- whose prosecution would jeopardize the interests of any informant of Appellants in maintaining the privacy of his or her identity and communications -- could not be honorably pursued if by doing so those informants' rights could be thereby invaded should the trial court, while the appeal were pending, allow Respondents to raid Appellants' confidential work product while the originals thereof were in the custody of the "receiver" Respondents nominated.

...

The rights of informants and Appellants would be permanently and irrevocably compromised were Appellants' files perused by any third person whatsoever prior to the final disposition of these appeals.

Ultimately, if the April 4, 1990 Order and the October 22, 1991 conditional dismissal were complied with in the manner

undoubtedly desired by Respondents, Appellants would be thus unable to pursue these appeals in any event, since Appellants would not be allowed to possess any copies of their files which are indeed an integral part of any "record on appeal" that might be eventually produced herein.

... POINTS AND AUTHORITIES

II. PERMITTING RESPONDENTS' ACCESS TO APPELLANTS' FILES, PERMITTING APPELLANTS' INFORMANTS' IDENTITIES TO BE DISCOVERED, OR PERMITTING THE "SHREDDING" OF APPELLANTS' FILES BEFORE THESE APPEALS ARE FINALLY DECIDED, WOULD RENDER THE APPEALS MOOT, INVADE APPELLANTS' AND THEIR INFORMANTS' RIGHTS OF PRIVACY, AND DEPRIVE APPELLANTS OF DUE PROCESS; THE OCTOBER 22, 1991 ORDER SHOULD BE AMENDED TO PREVENT SUCH RESULTS.

This Court's order ... would allow those appeals to ... maintain their various challenges to "the provisions of that [April 4, 1990] order prohibiting appellants from discussing the case or its settlement, and the order's provisions relating to appellant's files."

Those "provisions," of the trial court's April 4, 1990 order, include terms allowing Respondents to have access to Appellants' files, and to even arrange for those files' "shredding," simply by obtaining an order from the trial Court.
(Please see ... Respondents'... recent MOTION TO DISMISS, further confirming that "The [trial] Court ordered that the parties [including Respondents] could gain access [to Appellants' files, at any time] by applying to the [trial] court.")
... If Respondents took advantage of these "rights" to "search and destroy" Appellants' files, and did so before these pending appeals were concluded, these appeals would be rendered moot.
...were this Court to allow these appeals to proceed only if Appellants permit the status quo to be permanently and prejudicially altered in Respondents' favor, Appellants would be denied due process; National Union v. Arnold ... 348 U.S. 37:

> "In appraising the reasonableness of the State's order [dismissing the appeal], it is noteworthy that the [trial] court **did not seek to apply the bonds to the satisfaction of the respondents' judgment.**

> It [the trial court's order] merely directed petitioner [appellant] to deliver them [the bonds] to the court's receiver for safe-keeping. **Petitioner's appeal was not dismissed because of petitioner's failure to satisfy a judgment pending an appeal from it.** It was dismissed because of Petitioner's failure to comply with the [trial] court's order to **safeguard Petitioner's assets from dissipation** pending such appeal." [Emphasis added.]

Thus this Court's October 22, 1991 order can only meet a standard of "reasonableness" were "satisfaction of the respondents' judgment" not required as a condition of entertaining the appeals. Any contrary construction of that order would be illogical and unconstitutional.

APPENDIX E

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

MARIA SEWARD

v.

GERALD C. STERNS, ET AL.
NICHOLAS DAMER

FILED
NOV 19 1991
Court of Appeal - First App.Dist.
By RON D. BARROW
DEPUTY

A049857
A051426

San Francisco County
Sup. Ct. No. 826241

BY THE COURT:

In accordance with our prior orders, these appeals are hereby dismissed in their entirety.

Dated: November 19, 1991

Anderson, P. J.

APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITION FOR REVIEW
of Court of Appeal's
Dismissal of Appeals AO49857 & AO51426
on November 19, 1991

I... **STATEMENT OF... ISSUES PRESENTED**

This latest petition should be considered in conjunction with the previous Petition for ... Supersedeas ...

The earlier Petition focused on how the lower courts' actions, in denying any stays or any writ of supersedeas, essentially deprived the petitioner and the appellants of the plenary appellate relief specified under the California constitutional and legislative plan -- namely a meaningful appeal on the merits, including oral argument and the resolution of issues by way of a written and public opinion. Since the filing of that Petition, the predictions contained therein have proven accurate.

The Superior Court refused to even determine whether there were any entitlements to stays pursuant to pertinent provisions of the Code of Civil Procedure ... and the Court of Appeal likewise dismissed the pending appeals and denied a Petition for Rehearing timely filed on December 4, 1991.

Petitioner thus presents this Court not only with issues noted in the Petition filed November 15, 1991 (i.e., whether effective appellate review can be defeated by denial of all rights to stays.) Petitioner also offers these further, underlying issues: whether any trial court can deliberately frame "purchased" orders to preclude meaningful appellate review; whether such intentional denials of legal safeguards conflict with guarantees of due process and equal protection;

III. ARGUMENT

A. The Right of Appeal Cannot Be Defeated By The Trial Court's Compliant Design or By An Appellate Court's Deferential Default

As noted in the Petition filed in SO23852, the trial court, in compliance with the wishes of the defendants below, agreed to issue an order which could not be subject to any appellate stay prior to the specified time for obedience to that order. After 5 p.m. on Friday, March 9, 1990, Petitioner was directed to surrender all of his files -- and all copies thereof -- to a "receiver", and to do so by 9 a.m. on the following Monday morning, March 12. From that time on, Petitioner's files would be subject to immediate disclosure to his adversaries, and to imminent destruction by

"shredding" -- and both of these devastating developments would be without any appeal. Moreover, any errors or omissions, on the part of the "receiver", would be utterly without recourse by Petitioner, since the trial court simply ignored C.C.P. §567's requirement for the receiver's giving of an undertaking "Before entering upon [his] duties ..."

Nor can a Court of Appeal, in deference to the "dignity" of the trial court, deny the Petitioner an appeal unless he first surrenders a fundamental entitlement he is seeking to assert and defend in these proceedings -- namely, his right, as an attorney, to personally and continuously assure the private, privileged confidential integrity of his work product. Submission to the "receivership" arrangement -- which specifically includes

the total dispossession of every copy of Petitioner's personal papers -- would necessarily and unavoidably break Petitioner's individual links in the "chain of custody" of the various documents he had generated and unearthed, and would likewise expose all his informants to irremediable discovery by Respondents.

As said in Estate of Hart (1962) 204 C.A.2d 634, 637, 22 C.R. 495, "a right to appeal is basic". The clear, unmista-kable intent of the Legislature, in adopting C.C.P. §916 et sequitur, was to allow for a meaningful appeal in cases like this, and to provide for a stay of any order requiring the "delivery of personal property, including documents" (§917.2) and to also provide for a stay of any order which "appoints a receiver" (§917.5). Absent such a stay, any victory, at the end

of the appellate process, would be purely Pyrrhic at best.

Due process simply is not afforded where an appeal is allowed only if an appellant permits the status quo to be permanently and prejudicially altered in Respondents' favor -- that would be a denial of due process; see National Union v. Arnold (1954) 348 U.S. 37:

> "In appraising the reasonableness of the State's order [dismissing the appeal], it is noteworthy that the [trial] court did not seek to apply the bonds to the satisfaction of the respondents' judgment. It [the trial court's order] merely directed petitioner [appellant] to deliver them [the bonds] to the court's receiver for safekeeping. Petitioner's appeal was not dismissed because of petitioner's failure to satisfy a judgment pending an appeal from it.
>
> It was dismissed because of Petitioner's failure to comply with the [trial] court's order to safeguard Petitioner's assets from dissipation pending such appeal." [Emphasis added.]

Thus the Court of Appeal's October 22, 1991 order ... threatening the dismissal ultimately issued on November 19, 1991) did not meet the constitutional standard of "reasonableness" since "satisfaction of the respondents' judgment" was necessarily required as a condition of entertaining the Petitioner's appeals. Imposition of such a condition, as a way of circumventing the rights of Petitioner under C.C.P. §567, under C.C.P. §916 et sequitur, and under Article VI, §14 of the California Constitution, also operated to deny Petitioner the equal protection of the laws of this state.

The public policy of this state -- and indeed, the historical rationale for limited government on this continent -- is also deeply rooted in fundamental awareness of the fallibility of human beings. Such an immutable truth no doubt forms the basis of allowing a party to preserve the status quo while he or she seeks appellate remedies.

Appellate review would not be needed if one single man or woman could be counted on to always rule wisely and correctly, even under great pressure, in disposing of a

citizen's personal, property, and liberty interests. And as is so obviously clear in this present scenario, denials of stays and supersedeas truly mooted any appellate remedies.

TABLE OF AUTHORITIES

CALIFORNIA & FEDERAL CONSTITUTIONAL PROVISIONS:

California Constitution, Article VI, §14

U.S. Constitution, Due Process & Equal Protection Provisions
(Fifth, Sixth and Fourteenth Amendments)

APPENDIX G

Filed Mar 11 1992
Robert Wandruff Clerk
Deputy

First Appellate District, Division Four, No. [A049857 &] A051426
S024528

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

MARIA SEWARD, Respondent

v.

GERALD C. STERNS, Respondent
NICHOLAS DAMER Et al., Real Parties In Interest

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX H

TO: GCS [Real Party Gerald C. Sterns]

FROM: TCS [Thomas G. Smith]

RE: Office and Nairobi problems

DATE: September 1, 1982

I have been writing this memo since August 24th and am dictating it on September 1, therefore, the Nairobi problems to some extent no longer exist but I believe a discussion of them will reveal much of what I see is wrong with the office and the way it is managed.

I have worked with you and for you for more than 10-1/2 years as an attorney .... Nairobi is an example of cases that suffered; countless dollars were wasted and <u>not an insignificant amount stolen</u> ....[emphasis supplied.]

Nairobi's money will be gone like yesterday's rain unless we ... establish some money policies and controls.

Adding a few hundred dollars of phony cases costs for ICI [Investigative Consultants' International, Real Parties' "in-house" private investigative agency] is not going to cure the problem. It is tacky, unethical, and is causing concern among the [firm's several other] lawyers.

We would be in a hell of a fix if, for example, we get involved in litigation or arbitration over the fees in the Kelly Parks case with the Paden office, if they start to question why we have a $500 fee for ICI on the cost statement ....

Another thing that comes to mind. When John [Real Party Elstead] was in Seattle with us he left from Seattle and went to Boise. That ticket cost $129. He wanted to charge that ticket to the office rather than as a personal expense. The round trip fare from San Francisco to Seattle is $190. There is no reason why the Nairobi clients should pick up the cost of John's personal trip to Boise. If he had taken $120 from petty cash to spend on himself with no intention of repaying it you would have been outraged. Why should he be able to do the same thing in a round-about fashion? ....

I have stated the conditions in the office as I see them in very harsh terms in the hope that it will grab your attention and make you realize that we really need to do something and do it soon. [Nothing was done; consequently, the author, Smith, later left the firm.]

APPENDIX I

Abstract of the opinion of the United States Supreme Court published in National Union v. Arnold (1954) 348 US 37 (originally submitted by Petitioner, with the Petition received May 11, 1992, by way of a reduced copy of that opinion from the official reports) was omitted by Petitioner pursuant to permission conferred by the May 14, 1992 letter to Petitioner from Francis J. Lorson, Chief Deputy Clerk.

(2)

Supreme Court, U.S.
FILED
JUN 30 1992
OFFICE OF THE CLERK

No. 91-1967

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

NICHOLAS DAMER,
Petitioner,

VS.

SUPERIOR COURT IN AND FOR
THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

JOHN C. ELSTEAD, GERALD C. STERNS,
LAW OFFICES OF GERALD C. STERNS,
ELIZABETH WALKER,
LAWYERS MUTUAL INSURANCE COMPANY,
WEIL ADJUSTERS & CONSULTANTS, INC.,
GERSON MEHLMAN, and ROBERT L. DENEBEIM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MEMORANDUM OPPOSING CERTIORARI

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Counsel for JOHN C. ELSTEAD
Respondent

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BEST AVAILABLE COPY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MEMORANDUM OPPOSING CERTIORARI

Petitioner's request—that the Court rule the dismissal of an appeal unconstitutional—is weakened by the fact that "There is, of course, no constitutional right to an appeal." *See, Jones v. Barnes,* 463 U.S. 745, 751 (1983). As petitioner concedes, there are absolutely no grounds for review under existing law.

This is the same case in which petitioner Damer sought certiorari last year, in No. 90-1963. Petitioner Damer is an attorney. On behalf of a client, he commenced in a California trial

court, the underlying action against several parties. While plaintiff's case was being presented at trial, the parties participated in a judicially supervised settlement conference. During that conference, which took place over a three-day period from March 7 through March 9, 1990, the parties reached a settlement agreement.

The settlement agreement provided that the terms of the settlement would be confidential, the court file would be temporarily sealed subject to continuing judicial review, and the files of plaintiff's attorney, petitioner Damer, would be deposited with a receiver. The court found good cause for temporarily sealing the file, and approved the terms of the settlement agreement. The court explained that it was protecting the records so that they would remain available to the parties, the attorneys, and any investigating governmental agency. The sealing order was later modified, by order filed on June 19, 1990, to provide that only specified documents would remain sealed.

Petitioner immediately stated his intention not to comply with the terms of the settlement. He withdrew as counsel for plaintiff. During the hearing on March 9, 1990, the court ordered petitioner to comply with plaintiff's wishes and the terms of her agreement. Petitioner then violated the order in several ways. Among them was his refusal to relinquish the documents as ordered. After an order to show cause and a hearing, petitioner was found in contempt of court based on three violations. On August 29, 1990, a judgment of contempt, fining petitioner in the amount of $3,000 ($1,000 for each violation), was entered.

Petitioner commenced a series of appeals. [1] He unsuccessfully appealed the contempt judgment in the California Court of Appeal, the California Supreme Court, and this Court. He also separately appealed the violated orders themselves.

---

[1] Petitioner has filed the following appeals and petitions in this case:

1. Petition for Writ (regarding amount of sanctions), California Court of Appeal, A042593, June 14, 1988.
2. Notice of Appeal (from summary judgment in co-defendant's favor) California Court of Appeal, A043094, July 22, 1988.

The California Court of Appeal issued an order on October 22, 1991, dismissing many of petitioner's appeals unconditionally because of his lack of standing. It ordered other appeals dismissed unless petitioner complied with portions of the trial court's order and delivered referenced documents by November 5, 1991. Instead of complying with the Court of Appeal's orders, petitioner

---

3. Notice of Appeal (from order denying motion forbidding confidential settlement), California Court of Appeal, A043290, August 15, 1988.
4. Petition for Writ (regarding underlying orders), California Court of Appeal, A049125, March 23, 1990.
5. Petition for Writ (regarding denial of petition No. A049125), California Supreme Court, S015141, April 18, 1990.
6. Notice of Appeal (from numerous orders), California Court of Appeal, A049857, May 25, 1990.
7. Petition for Writ of Certiorari of Prohibition (regarding contempt judgment and confidentiality and settlement agreement orders), California Court of Appeal, A051211, October 5, 1990.
8. Notice of Appeal (from contempt order and sanctions), California Court of Appeal, A051426, October 25, 1990.
9. Petition for Review (from denial of petition A051211), California Supreme Court, S019454, February 4, 1991.
10. Petition for Writ of Certiorari (from denial of petition S019454, United States Supreme Court, 90-1963, June 25, 1991.
11. Petition for Writ of Supersedeas (application for stay of order conditionally dismissing appeals A049857 and A051426), California Court of Appeal, October 28, 1991.
12. Petition for Writ of Mandate, Transfer, Supersedeas or Prohibition (for stay of order conditionally dismissing appeals), California Supreme Court, S023852, November 15, 1991.
13. Petition for Rehearing (for rehearing of November 1991 order of dismissal of A049857 AND A051426), California Court of Appeal, December 4, 1991.
14. Petition for Review (of dismissal of A049857 and A051426), California Supreme Court, December 30, 1991.

filed a petition for writ of supersedeas. The Court of Appeal denied the petition and, in an order dated November 5, 1991, again ordered the appeals dismissed unless petitioner delivered the documents. Petitioner refused to do so and his appeals were dismissed in an order dated November 19, 1991. Petitioner Damer seeks to have this Court rule that the dismissal was unconstitutional.

Because of this Court's holding that there is no constitutional right that prevents a state court from dismissing an appeal, there is no reason for this Court to grant certiorari in this case. *National Union v. Arnold,* 348 U.S. 37 (1954). The order of dismissal is correct and does not violate the Constitution. The petition does not concern an important question that is the subject of a conflict of decisions. The petition should be denied.

Respectfully submitted,

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